Consec Security *and* Teamsters Union Local 102 a/w International Brotherhood of Teamsters, Local 69. Case 22–CA–22679

August 12, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On March 24, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions[2] and to adopt the recommended Order as modified.[3]

The judge found, and we agree, that under the rationale of *Great Western Produce, Inc*.,[4] the Respondent's discharge of employee Wendy Harris violated Section 8(a)(5). In *Great Western*, the Board held that if an employer's unlawfully imposed rules were a factor in the discharge of an employee, then the discharge violates Section 8 (a)(5). The Board also noted that an employer could raise at the compliance stage defenses to the reinstatement and backpay remedy for employees discharged in violation of Section 8(a)(5).[5]

The Respondent contends that it established at the hearing that Harris would have been discharged for insubordination in the form of a refusal to come to work regardless of her breach of the rule requiring notice and approval of shift exchanges (the shift exchange rule). It argues that Harris, therefore, is not entitled to reinstatement and that there is no need for litigation of this issue at the compliance stage. We agree that the Respondent presented its defense to the reinstatement remedy at the hearing and that no further litigation of the defense is required. We disagree, however, with the Respondent's contention that it established that Harris is not entitled to reinstatement.

The documentary and testimonial evidence does not support the Respondent's assertion that it discharged Harris for insubordination. Harris' termination notice states:

> You had been given written notice that all changes in schedule were to be first approved by the Management Office before being instituted. Yet on 4/15/98 such a switch was made causing a double shift and an accident between the Consec patrol vehicle and a Port Authority vehicle. Such actions will not be tolerated.

In the termination notice, the Respondent cites only Harris' failure to get prior approval of a switch in schedule. It makes no reference whatsoever to her failure to come in to work. The documentary evidence, therefore, goes against the Respondent's assertion that it would have discharged Harris for insubordination even in the absence of her breach of the shift exchange rule.

Eileen Gilgallon, the Respondent's president, testified as follows:

> Q. And what—what was the reason why Ms. Harris was terminated?
>
> A. She did not—she did not notify the office and she refused to come in.
>
> Q. Is a refusal to follow an order considered by you to be insubordination?
>
> A. Yes.
>
> Q. All right. Could you have terminated her for insubordination?
>
> A. Yes.
>
> Q. Did you care internally whether she was terminated for insubordination or for not notifying the office of the fact that she was not coming in and that she was trying to get somebody else to cover her shift?

[1] The underlying decision in this proceeding issuing a bargaining order against the Respondent under the rationale of *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), was enforced by the Court of Appeals for the Third Circuit. *NLRB v. Consec Security*, Nos. 98–3299 and 98–3350 (June 8, 1999). Member Brame did not participate in the Board's underlying decision and, accordingly, accepts the Third Circuit's enforcement of that decision as the law of the case.

[2] We agree with the judge's conclusion that the Respondent's rule prescribing the procedure for exchanging shifts with other employees affected the unit employees' terms and conditions of employment. See *Meat Cutters Local Union 189 v. Jewell Tea Co.,* 381 U.S. 676, 691 (1965) (particular hours and days of the week employees are required to work are within "wages, hours, and other terms and conditions of employment"); *Benteler Industries*, 323 NLRB 712, 715 (1997) (change in procedure for exercising shift preference found to be material change affecting terms and conditions of employment); and *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750, 751 (1996) (rule having potential to affect continued employment of employees subjected to it found to be a condition of employment).

[3] We have modified the recommended Order to conform to the remedy given in those cases cited by the judge where an employee was discharged pursuant to an unlawfully implemented employment rule. *Great Western Produce*, 299 NLRB 1004 (1990), and *Randolph Children's Home*, 309 NLRB 341 (1992). See also *Tocco, Inc*., 323 NLRB 480 (1997). We have also corrected the inadvertent mislettering of the paragraphs in the recommended Order.

In joining this broad remedy covering ''any other unit employees [besides Harris] who were discharged pursuant to the unlawfully implemented employment rule," Member Brame stresses that it remains the General Counsel's burden, at any compliance proceeding, to establish by evidence that would be admissible at an unfair labor practice hearing the causal connection between the Respondent's rule and the discharge action as the basis for granting relief.

[4] 299 NLRB 1004 (1990).

[5] Id. at 1005 fn. 10, and 1006. See also *Randolph Children's Home*, 309 NLRB at 341. (At compliance stage in an 8(a)(5) discharge case, respondent may avoid remedial obligation of reinstatement by demonstrating that it would have discharged the employee even absent employee's violation of unlawfully promulgated rule.)

A. Well, my main concern was the fact that the schedule was not notified to the manager's office.

While the above testimony indicates that the Respondent was concerned about Harris' failure to come to work, it does not establish that she would have been discharged for not coming to work absent her failure to get approval of the shift exchange. To the contrary, Gilgallon's testimony shows clearly that breach of the shift exchange rule was the most significant factor in the decision to terminate Harris.

Accordingly, we find that the record does not support the Respondent's claim that it would have discharged Harris for insubordination even in the absence of her breach of the shift exchange rule here at issue. We thus conclude that Harris is entitled to reinstatement and backpay in accord with the remedy section of this decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consec Security, Kearny, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (c), and reletter the remaining paragraphs accordingly.

"(a) Within 14 days from the date of this Order, offer Wendy Harris and any other unit employees who were discharged pursuant to the unlawfully implemented employment rule full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(b) Make Wendy Harris and any other unit employees who were discharged pursuant to the unlawfully implemented employment rule whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Wendy Harris and any other unit employees who were discharged pursuant to the unlawfully implemented employment rule and, within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate and enforce employment rules, affecting employees represented by a labor organization, without notifying and bargaining with such labor organization.

WE WILL NOT discharge employees who are represented in an appropriate unit by a labor organization for transgressing any employment rules which have been promulgated without notice to or bargaining with such labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Wendy Harris and any other unit employees who were discharged pursuant to the unlawfully implemented employment rule full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Harris and any other unit employees who were discharged pursuant to the unlawfully implemented employment rule whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Wendy Harris and any other unit employees who were discharged pursuant to the unlawfully implemented employment rule, and within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

CONSEC SECURITY

Richard Fox, Esq., for the General Counsel.
John Craner, Esq., for the Respondent.
Paul Schachter, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on February 3,1999. The charge was filed on May 7, 1998, and the complaint was issued on September 3, 1998. In substance, the complaint alleges that the Employer violated Section 8(a)(1) and (5) when, on or

about April 30, 1998, it discharged Wendy Harris, pursuant to a rule unilaterally promulgated in early January 1997. The General Counsel does not contend that the discharge was motivated by antiunion considerations and therefore a violation of Section 8(a)(1) and (3) of the Act is not sought.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[1]

II. ALLEGED UNFAIR LABOR PRACTICES

The Company had a contract with the Port Authority to provide taxi dispatch services at Newark airport. Its employees, including Wendy Harris, had the title of supervisor but are not in fact supervisors as defined in Section 2(11) of the National Labor Relations Act.

The Union had previously filed a charge in Case 22–CA–21682 against the Company on November 12, 1996. After investigation, a complaint and amended complaint was issued. Thereafter, the matter was tried in March and April 1997 and the administrative law judge issued his decision and recommended Order on August 20, 1997. On March 13, 1998, the Board, at 325 NLRB 453, held that the Respondent had violated Section 8(a)(1), (3), and (5) of the Act, and because of the "severity of the Respondent's misconduct," issued a bargaining order pursuant to the rationale of *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).[2] The bargaining order was retroactive to November 5, 1996. The bargaining unit found to be appropriate was:

> All full-time and regular part-time taxi dispatchers and supervisors (non-statutory) employed by the Employer at Newark International Airport, Newark, New Jersey but excluding all other employees, including managers, statutory supervisors and guards within the meaning of the Act.

The Board's decision in the prior case is presently pending before a circuit court of appeals.

In early January 1997, the Company issued the following memorandum to its employees located at the Newark airport.

> Effective immediately, all changes in regularly scheduled days off for supervisors must be approved by the main office.
>
> Although we fully realize the need to exchange days off from time to time, it must first be approved by the main office. This will discontinue the confusion on schedules and payrolls.

The above memorandum, in my opinion, incorporates a new rule for employees and was promulgated without notice to the Union. The Union was therefore not given an opportunity to bargain about it. The rule was promulgated after the charge had been filed and the complaint had been issued in the preceding unfair labor practice case but before a decision was issued by the Board. I do not agree with the Respondent's contention that this was not a rule affecting terms and conditions of employment or a rule which did not change existing terms in any material way.

On January 27, 1998, Harris received a written warning for failing to follow the above-described rule. However, because Harris indicated that she was not fully aware of the rule, she was not suspended as recommended by her supervisor.

Subsequently, on April 15, 1998, Harris switched her assignment with another employee, but the other employee didn't show up for work. As a consequence, a third employee was required to work a double shift and got into an accident with a company vehicle.

On April 20, 1998, Harris was discharged and the termination memorandum read as follows:

> Due to the incident that occurred at Newark Airport on 4/15/98, this company has found it necessary to terminate your services as supervisor of the Taxi Dispatch Operation at that facility.
>
> You had been given written notice that all changes in schedule were to be first approved by the Management Office before being instituted. Yet on 4/15/98 such a switch was made causing a double shift and an accident between the Consec patrol vehicle and a Port Authority vehicle. Such actions will not be tolerated.

III. ANALYSIS

It is self evident that the Company unilaterally promulgated a new work rule in January 1998 affecting the terms and conditions of employment. It is conceded that the Union was not notified of this rule and therefore was not given an opportunity to bargain about it. As the Board's bargaining order, issued on March 13, 1998, was retroactive to November 5, 1996, and the Company was on notice that the General Counsel was seeking a bargaining order, the company acted at its own peril in making unilateral changes. *Power Inc. v. NLRB*, 40 F.3d 409 (D.C. Cir. 1994); *Lapeer Foundry & Machine*, 289 NLRB 952 (1988).

In *Great Western Produce, Inc*., 299 NLRB 1004 (1990), the Board, held that certain discharges were violative of Section 8(a)(5) because they resulted from the unilateral promulgation of a rule. The Board stated:

> The *Wright Line* analysis is applied to alleged violations of Section 8(a)(3). The focus of such an analysis, i.e., whether the employer would have discharged the employee even absent the employee's protected concerted activity, is on the employer's interference with the employee's Section 7 rights. In contrast, the focus of the analysis of a discharge alleged to constitute a refusal to bargain in violation of Section 8(a)(5) must be on the injury to the union's status as bargaining representative. An employer that refuses to bargain by unilaterally changing its employees' terms and conditions of employment damages the union's status as bargaining representative of the unit employees. That status is further damaged with each application of the unlawfully changed term or condition of

[1] According to Eileen Gilgallon, the Company's correct name is CFS Services Incorporated; Consec Security being a trade name. She is the chief operating officer.

[2] It is noted that the Regional Office also obtained a 10(j) injunction in the Federal district court which, among other things, required the Respondent to reinstate certain discharged employees, (including Harris) and also ordered the Respondent to bargain with the Union. That injunction expired as a matter of law when the Board issued its decision on March 13, 1998.

employment. No otherwise valid reason asserted to justify discharging the employee can repair the damage suffered by the bargaining representative as a result of the application of the changed term or condition.

We shall continue to apply the following test for analyzing discharges and other discipline alleged to violate Section 8(a)(5): If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5).

Therefore, if an employee is discharged pursuant to a rule which has been unilaterally and therefore illegally promulgated, the discharge is also a violation of the Act. *Randolph Children's Home,* 309 NLRB 341 (1992).

CONCLUSION OF LAW

By unilaterally implementing, without prior notification to and bargaining with the Union, a rule requiring employees to obtain approval of management for all changes in scheduled days off, and by discharging Wendy Harris for breach of this rule, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The contract between the Respondent and the Port Authority terminated on July 1, 1998, and the Company has ceased performing services at Newark airport. All employees located there were given an opportunity to transfer to other jobs, but some declined because of transportation problems. Ms. Harris was not offered the opportunity to transfer and therefore she never had the opportunity to decide whether to accept an offer of a transfer.

As Ms. Harris was discharged because of her transgression of an illegally promulgated rule, she should be awarded backpay and offered reinstatement to her former or substantially equivalent position of employment. Accordingly, it is recommended that the Respondent offer Harris reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of her reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [3]

ORDER

The Respondent, Consec Security, Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and enforcing employment rules affecting employees represented by a labor organization, without notifying and bargaining with such labor organization.

(b) Discharging employees employed within the appropriate bargaining unit for transgressing any unilaterally promulgated rules.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Wendy Harris, full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Wendy Harris and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its home facility, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. As the Respondent has terminated its operations at Newark airport, the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent within the Newark airport bargaining unit at any time since January 1, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."